REMARKS

Applicant respectfully requests reconsideration of the present application in view of the foregoing amendments and in view of the reasons that follow. Claims 1-8, 12-21, 23-28, 37, 39, 40, 53, 56, 58, and 59 have been amended. Claims 9-11, 22, 29-36, 38, 41-52, 54, 55, and 57 have been canceled without prejudice. Claims 60-64 are being added. Claims 1-8, 12-21, 23-28, 37, 39, 40, 53, 56, and 58-64 are now pending in this application.

I. Procedural Posture and Amendments to the Claims

The present application was previously on appeal. The claims were previously amended by an Examiner's amendment negotiated by Applicant's representative under the understanding that the amendments would place the application in a condition for allowance. An Office Action was then promptly issued rejecting the claims under a new priority finding by the Examiner.

Claims 1-8, 12-21, 23-28, 37, 39, 40, 53, 56, 58, and 59 have been amended to clarify the claimed subject matter and to clearly show that the claimed subject matter antedates the reference cited. Support for the amendment can be found throughout U.S. Provisional Application 60/134,782, filed May 19, 1999, to which the present application claims benefit. In particular, support for the amendment can be found at least in:

- Page 4, line 16 through page 5, line 11.
- Page 6, lines 20-31
- Page 10, lines 25-30
- Page 12, lines 13-18
- Page 14, lines 1-16
- Page 16, line 20 through page 19, line 10.

II. Priority

Applicant respectfully submits that the Examiner's priority determinations are now moot in view of the above amendments.

III. Claim Rejections Under 35 U.S.C. § 102(a)

On page 3 of the Office Action, Claims 1-40,42, 43 and 46-59 were rejected under 35 U.S.C. § 102(a) as being anticipated by U.S. Patent No. 6,456,725 to Cox et al. (hereinafter "Cox"). Applicant respectfully disagrees. In order to further prosecution, Applicant has amended the claims rendering the rejections moot. Cox is not prior art.

Applicant submits that amended Claims 1-8, 12-21, 23-28, 37, 39, 40, 53, 56, 58, and 59 are supported at least by U.S. Provisional Application 60/134,782, filed May 19, 1999, to which the present application claims benefit. The earliest priority date of Cox is June 24, 1999. Thus, the present claims have a priority date earlier than Cox. Therefore, Cox is not prior art. Consequently, the rejection is now improper and should be withdrawn.

An anticipation rejection cannot be properly maintained where the reference cited is not prior art. For at least these reasons, the rejection of Claims 1-40,42, 43 and 46-59 under 35 U.S.C. § 102(a) should be withdrawn. New Claims 60-64 are patentable over Cox for at least the same reasons.

IV. Claim Rejections Under 35 U.S.C. § 102(f)

On page 10 of the Office Action, Claims 1-40,42, 43 and 46-59 were rejected under 35 U.S.C. § 102(f). Applicant respectfully disagrees. The rejection is moot in view of the amendment. Applicant's amended claims are supported by a priority date earlier than the earliest priority date of Cox rendering the rejection moot. For at least these reasons, the rejection of Claims 1-40,42, 43 and 46-59 under 35 U.S.C. § 102(f) should be withdrawn.

Moreover, a rejection under 35 U.S.C. § 102(f) is *prima facie* improper where the Examiner's rejection is based on a 35 U.S.C. § 102(a) reference and, further, where the Examiner has provided no *actual evidence of derivation.*

On page 10, the Examiner argues (with underlining added):

> As per claim 1-40, 42, 43, and 46-59, Cox discloses the claimed invention in U.S. Patent 6,456,725. Present application discloses claims that are identical or nearly identical to the prior patent, which was issued almost one year before filing of present application. Also, the terms used by present application are different from the Specification.

This *issuance* of a patent is irrelevant in derivation analysis. Claims that are identical to *a prior patent* do not constitute evidence of *derivation*. Though the MPEP is sparse on this subject, the law is clear that the Examiner (or more commonly, the Applicant) must show evidence of the act of derivation (such as an affidavit attesting so). (See e.g., Donner. Patent Prosecution. 6th Ed. BNA Books. Arlington, VA. 2009). Clearly, in these types of situations, a derivation rejection is improper where a Section 102(a) is available.

For at least the above reasons, the rejection of Claims 1-40,42, 43 and 46-59 under 35 U.S.C. § 102(f) should be withdrawn. New Claims 60-64 are patentable for at least the same reasons.

* * *

Applicant believes that the present application is now in condition for allowance. Favorable reconsideration of the application as amended is respectfully requested.

The Examiner is invited to contact the undersigned by telephone if it is felt that a telephone interview would advance the prosecution of the present application.

The Commissioner is hereby authorized to charge any additional fees which may be required regarding this application under 37 C.F.R. §§ 1.16-1.17, or credit any overpayment, to Deposit Account No. 19-0741. Should no proper payment be enclosed herewith, as by the credit card payment instructions in EFS-Web being incorrect or absent, resulting in a rejected or incorrect credit card transaction, the Commissioner is authorized to charge the unpaid amount to Deposit Account No. 19-0741. If any extensions of time are needed for timely acceptance of

papers submitted herewith, Applicant hereby petitions for such extension under 37 C.F.R. §1.136 and authorizes payment of any such extensions fees to Deposit Account No. 19-0741.

Respectfully submitted,

Date February 18, 2011

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